

Hon Andrew Little

Minister of Justice

Minister for Courts

Minister for Treaty of Waitangi Negotiations

Minister Responsible for the NZSIS

Minister Responsible for the GCSB

Minister Responsible for Pike River Re-entry



29 JAN 2019



Dear



Official Information Act 1982 request – review of the OIA and proactive releases

I refer to your complaint to the Office of the Ombudsman on 26 November 2018 regarding my response on 15 November 2018 to your request for information under the Official Information Act 1982. ("the Act") for:

"all advice and communications on plans for a review of the OIA, including covering proactive releases under s48."

I have revisited my decision on your initial request for information, particularly regarding documents 2 and 6. The details of that decision are detailed at Appendix A.

The papers enclosed release some of the information that was previously withheld, with redactions for information which continues to be withheld under:

- section 9(2)(a) of the Act to protect the privacy of individuals;
- section 9(f)(iv) of the Act to maintain the confidentiality of advice tendered by Ministers of the Crown and officials; and
- section 9(2)(g)(i) of the Act to maintain the effective conduct of public affairs through free and frank expression of opinions by officials.

I have decided to continue to withhold documents 4 and 5 in full under section 9(2)(g)(i) of the Act. I do not consider that the reason for withholding the information is outweighed by public interest in disclosure.

The information I continue to withhold is subject to the Ombudsman's ongoing investigation.

Yours sincerely

Hon Andrew Little
Minister of Justice

Appendix A

#	Document	Document Title	Initial decision	Current decision
1	Email	A/M – proactive release (12 February 2018 at 12:18 p.m.)	Released with some information withheld under 9(2)(a) (privacy of natural persons)	No change
	Attachment	Aide Memoire: Cabinet paper – Strengthening proactive release requirements	Released with some information withheld under 9(2)(g)(i) (free and frank)	No change
2	Email	AM for meeting with Ministers Hipkins and Curran on possible OIA reform (18 May 2018 at 3:03 p.m.)	Released in full	No change
	Attachment	Aide Memoire: Meeting with Ministers Hipkins and Curran – possible reform of the OIA	Released with some information withheld under 9(2)(g)(i) (free and frank)	No change
	Attachment	Appendix one: Possible approaches to legislative reform of the OIA	Released with some information withheld under 9(2)(f)(iv)	Released with some information withheld under 9(2)(f)(iv)
3		Appendix two: Law Commission's 2012 Report	Released in full	No change
	Weekly reports	Information extracted from two Weekly Reports to the Minister of Justice dated 4 May and 7 September 2018. The remainder of these reports are out of scope.	Released with some information withheld under 9(2)(a) (privacy of natural persons) Released with some information withheld under 9(2)(f)(iv) Released with some information withheld under 9(2)(g)(i) (free and frank)	No change

4	Email	15 May 2018 at 11:11 a.m.	Withheld in full under 9(2)(g)(i) (free and frank)	No change
	Attachment:	Briefing	Withheld in full under 9(2)(g)(i) (free and frank)	No change
5	Email	15 May 2018 at 11:23 a.m.	Withheld in full under 9(2)(g)(i) (free and frank)	No change
	Email	Papers for meeting with Mins Curran and Hipkins, 22 May 8 pm (17 May 2018 at 5:21 p.m.)	Released with some information withheld under 9(2)(a) (privacy of natural persons)	No change
6	Attachment	SSC Report on possible legislative reform of the OIA	Released with some information withheld under 9(2)(a) (privacy of natural persons) Released with some information withheld under 9(2)(f)(iv) Released with some information withheld under 9(2)(g)(i) (free and frank)	Released with some information withheld under 9(2)(a) (privacy of natural persons) Released with some information withheld under 9(2)(g)(i) (free and frank)
	Attachment	Law Commission's 2012 Report (Attachment A)	Released in full	No change
	Attachment	OIA – System-wide progress (Attachment B)	Released in full	No change
	Attachment	Possible approaches to legislative report to the OIA (Attachment C)	Released with some information withheld under 9(2)(f)(iv)	Released with some information withheld under 9(2)(f)(iv)
	Attachment	Proactive release of Cabinet material and key advice (Attachment D)	Released with some information withheld under 9(2)(g)(i) (free and frank)	No change

From Hubscher, Chris **Date** Monday, 12 February 2018 12:18:48 p.m.
To andrew.williams@parliament.govt.nz
Cc correspondence, official; Purple, Folder; Greaney, Caroline; Chhana, Rajesh; Sye, Lauren
Subject A/M - proactive release

 [image003.jpg](#) (6 KB HTML)  [20180212 - AM - Proactive release and the recommended reforms](#)

Hi Andrew

Please find an A/M for this GOV item attached. I'll be in attendance for Justice.

Regards, Chris

 http://justice.govt.nz/courts/shared/justice_logo.jpg

Chris Hubscher
Policy Manager | Electoral and Constitutional
DDI: +64 4 918 8930 | Ext 58930
Cell: s 9(2)(a)
www.justice.govt.nz



Aide Memoire: Cabinet paper - Strengthening proactive release requirements

GOV Committee, 4.30pm Tuesday 13 February 2018

Purpose

1. The Associate Minister of State Services (Open Government), Hon Clare Curran proposes to strengthen the expectations on ministers around the proactive release of official information. Justice supports this proposal, but would prefer a phase-in period, to allow for consistent systems across government to be established and tested.
2. Hon Curran may also suggest the government look to progress legislative reform of the Official Information Act 1982 (OIA), as per Law Commission and Open Government Partnership (OGP) recommendations *s 9(2)(g)(i)*

The proposal to strengthen proactive release requirements

3. Hon Curran proposes to introduce a non-statutory process for ministers to proactively release information that would be separate to, but informed by, the OIA.
4. The Cabinet Manual already includes a general expectation that Cabinet and Cabinet Committee papers and minutes on significant policy decisions should be released proactively once decisions have been made.
5. Hon Curran's preferred proposal would expand this expectation to include *all* Cabinet material where decisions are made by Cabinet *and* the key departmental advice papers to ministers taking these decisions (subject to a risk assessment, and with some exceptions e.g. in respect of appointments and ongoing negotiations).
6. We support this proposal as it is in line with the aims of the OIA, but would prefer a phase-in period to allow for consistent systems across government to be established and tested.
7. *s 9(2)(g)(i)*



Open Government Partnership and Law Commission recommendations for law reform

8. The OGP is an international agreement by states committed to making government more open, effective, and accountable. In January 2018, the OGP's Independent Reporting Mechanism issued a draft report for public comment that assesses New Zealand's progress halfway through our second Action Plan. It suggests considering the Law Commission's recommended OIA reforms, including those related to proactive release.
9. The Law Commission recommendations were made in its 2012 report *The Public's Right to Know: Review of the Official Information Legislation*. It called for:
 - placing a duty on agencies to take all reasonably practicable steps to proactively make official information publicly available, and
 - extension of the OIA protection against certain civil and criminal actions to cover information released proactively.
10. The Law Commission also recommended extending the OIA's application to certain parliamentary information (e.g. Parliamentary Services and the Office of the Clerk), simplifying unclear withholding grounds, better protecting commercially sensitive information, establishing a statutory oversight function, and clarifying the OIA's reach.
11. The previous government did not pursue any of these recommendations.

Justice's advice on legislative reform of the OIA

12.s 9(2)(g)(i)

13. In respect of the suggestion that the OIA should cover parliamentary information, Parliament already has processes for developing rules around access and use of information, which are designed to achieve a balance between access to information and Parliament's effective functioning. This approach is consistent with those taken in the Australian and Canadian federal parliaments, and the US congress.
14. The SSC and Ombudsman announced a joint work programme to improve public sector OIA practice in October 2016. In addition to education and guidance, the SSC is publishing OIA statistics from 110 government agencies, and the Chief Ombudsman analyses and publishes OIA complaints received against Ministers and agencies. These statistics, which are updated every six months, are an accountability league table - the public can see how well each agency is applying the OIA, and which agencies are making information increasingly accessible.
15. This work programme, and the proactive release proposal, present a good opportunity to significantly improve the transparency of government. s 9(2)(g)(i)

From Denoual, Hayley **Date** Friday, 18 May 2018 3:03:04 p.m.
To Andrew Williams
Cc Johnston, Anna; Hubscher, Chris; Greaney, Caroline; Purple, Folder; correspondence, official; Crooke, David
Subject AM for meeting with Ministers Hipkins and Curran on possible OIA reform - Tuesday 22 May
 [20180515 - AM - Meeting with Ministers Hipkins and Curran.pdf](#) (361 KB HTML)  [180518 OIA I](#)

Hi Andrew

Please find attached an AM for the Minister's meeting with Ministers Hipkins and Curran on possible reform of the Official Information Act 1982 next Tuesday 22 May - together with two appendices providing further background information

Thanks

Hayley (on behalf of Anna Johnston)

 http://www.justice.govt.nz/courts/shared/justice_logo.jpg

Hayley Denoual
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Civil and Constitutional Policy
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Please note that I do not work on Tuesdays.



Meeting with Ministers Hipkins and Curran – possible reform of the Official Information Act 1982

Hon Andrew Little, Minister of Justice
8pm, 22 May 2018

Purpose

1. You are meeting with Hon Chris Hipkins, Minister for State Services and Hon Clare Curran, Associate Minister for State Services (Open Government) on 22 May 2018. This note provides you with background for that meeting and some possible talking points.
2. The meeting follows discussion at Cabinet about possible reform of the Official Information Act 1982 (OIA). Hon Curran would like to carry out targeted consultation with OIA experts to help Ministers decide whether to progress a formal review of the OIA.

Key messages

3. The Ministry of Justice administers the OIA and would be responsible for carrying out targeted consultation and any review of the OIA, subject to other priorities.
4. Ministers may wish to consider:
 - the respective roles of the relevant Ministers and agencies, and
 - what kind of review (if any) the Government is open to (*see Appendix One for four possible approaches*).
5. The SSC and Ombudsmen's joint work programme to improve public sector OIA practice and Minister Curran's proactive release proposal, both present good opportunities to significantly improve the transparency of government.
6. Liability risks associated with strengthened proactive release requirements may be mitigated by operational measures (for example, a new risk assessment approach).

Proposed targeted consultation

7. We understand from SSC that Minister Curran considers that targeted consultation with OIA experts would complement the information the Government already has and assist Ministers in deciding whether to proceed with OIA reform.

Possible reform to support proactive release

10. The Government is considering a proposal to strengthen requirements for proactive release of official information. In this context, Ministers have discussed whether the OIA should be amended to protect Ministers and agencies from civil and criminal liability when they release information proactively. The OIA currently protects against actions such as defamation claims, breach of privacy and breach of confidence, where information has been released in good faith under the OIA.

Background

The Law Commission's report

13. In its 2012 report *The Public's Right to Know*, the Law Commission recommended that protection from liability should not be extended to proactively released information because:

- proactive release involves an active and voluntary decision to publish, which should include considering the legal consequences
- damage from information proactively released is potentially greater as it is released to more people
- if information released under the OIA is published by a requestor (for example, online), a person who is harmed can take action against the requestor but not the agency. A person harmed by information released proactively may be left with no recourse.

14. The report found that the fundamentals of the OIA remained sound, but that reform was necessary to respond to the context in which the Act now operates, such as changes in technology. Its recommendations are outlined in *Appendix Two* and include:

- imposing a duty on agencies to take reasonable steps to proactively release material
- extending the OIA's application to certain parliamentary information (such as Parliamentary Services and the Office of the Clerk)
- clarifying, and adding, withholding grounds
- new grounds of complaint to the Ombudsmen (for example, unsatisfactory processes)
- allowing individuals to bring proceedings against an agency that does not act on the Ombudsmen's recommendation
- establishing a statutory oversight function, such as an Information Commissioner.

15. The previous Government did not pursue most of the recommendations. Recent work has focussed on improving OIA practice and been led by SSC and the Ombudsmen.

Calls for reform to the OIA

16. There have been some recent calls for reform to the OIA. For example, Sir Geoffrey Palmer has recommended that the Act be redrafted. An Independent researcher for the Open Government Partnership (OGP) also recommended that New Zealand's next Action Plan address broader OIA reform, including some of the Law Commission recommendations. SSC notes that OIA reform will feature in discussions on the 2018-20 OGP Action Plan.

17. Media commentators, such as Dr Bryce Edwards, have raised concern about OIA processes, but the dominant theme is compliance by government rather than the need for legislative reform.



In 2012, The Law Commission published *The Public's Right to Know on the functioning of the official information legislation*.
The report's recommendations included significant legislative change, but the then-Government favoured largely operational improvements. The focus since then has been on improving OIA practice, and most recently, increasing the level of proactive release.
Law change that seeks to improve the openness, transparency and accessibility of government information remains an option. Four possible approaches to legislative reform are set out below.

**PUBLIC FEEDBACK on the OGI
NATIONAL ACTION PLAN 2016-2018**

- Extend OIA to Parliamentary bodies
- Establish Official Information Authority
- Mandatory publication requirements and centralised portal
- Anyone able to make a request for information.
- Provide for proactive release in law.

**ACADEMICS AND OTHER
COMMENTATORS VIEWS**

- First-principles review of the OIA
- Extend to Solicitor-General and some Parliamentary bodies
- Establish Information Authority.
- Stronger complaints regime
- Provide for proactive release

Full public review of official information legislation

- Could target areas that would benefit from further public engagement (e.g. proposal to establish an Information Commissioner)

- Would take account of developments since 2012

s 9(2)(f)(iv)

Reconsider full set of recommendations from the Law Commission's 2012 Report

- Builds on public consultation process undertaken by the Law Commission in 2009-2012, where issues and recommendations remain relevant

s 9(2)(f)(iv)

- Use targeted consultation (e.g. with OIA experts) and departmental consultation to check the Law Commission recommendations remain relevant

Targeted reforms to address discrete Law Commission recommendations

s 9(2)(f)(iv)

- Use targeted consultation (e.g. with OIA experts) and departmental consultation to check approach remains up to date

Legislative amendments to support proactive release

- Legislate specific amendments to strengthen the existing push towards proactive release

s 9(2)(f)(iv)

s 9(2)(f)(iv)



Law Commission's 2012 Report *The Public's Right to Know: Review of the Official Information Legislation*: Overview of Key Recommendations and Related Work to Date (Appendix Two)

Recommendation	Previous Government's response	Work progressed to date
The legislative vehicle		
<ul style="list-style-type: none"> Re-draft and re-enact the OIA and LGOIMA to achieve better order and structure, and to modernise and simplify the language 	Disagreed, but committed to keep the operation of the official information legislation under review and progress other recommendations as competing priorities allowed.	Not applicable
The withholding grounds		
<ul style="list-style-type: none"> Make the 'good government' withholding grounds easier to understand (constitutional conventions and free and frank advice). Introduce three new withholding grounds for protecting: <ul style="list-style-type: none"> Sensitive commercial information relating to financial position Information provided for the purpose of an investigation or inquiry sensitive cultural information (there is currently limited provision for this in the LGOIMA but not the OIA). Where third party information comes under the scope of a request, require that the third party be given advance notice. 	<p>Agreed in principle to withholding grounds for sensitive commercial information relating to financial position.</p> <p>No specific response in relation to the other recommendations.</p> <p>The Government committed to assessing whether the recommendations for clarification were appropriate for inclusion in legislative vehicles such as the Statutes Amendment Bill when they became available.</p>	While the Office of the Ombudsman, and SSC, has published guides on the existing withholding grounds over the past three years, they do not address the need identified by the Report to express existing concepts in plainer language, or to introduce new protections for certain types of information.
Requests and resources		
<ul style="list-style-type: none"> Better define the term "due particularity". Extend the "substantial collation and research" refusal grounds to recognise that other elements of processing a request (e.g. consultation) can present unreasonable burden on agencies. Clarify the definition of "vexatious requests". 	No specific response	No work progressed
Processing requests		
<ul style="list-style-type: none"> Clarify: <ul style="list-style-type: none"> that one extension can be taken above the standard 20-day timeframe. that partial transfers of requests are permitted. the process for handling "urgent" requests. 	No specific response	The Official Information Amendment Act 2015 clarified that partial transfers are permitted.
Complaints and remedies		
<ul style="list-style-type: none"> Align the two distinct review processes that the OIA provides for (the Ombudsman conducts reviews according to the OIA or the Ombudsman Act, depending on the type of information) Introduce an additional grounds for complaint to the Ombudsman for unsatisfactory agency process (e.g. late responses) Allow an individual whose case has resulted in Ombudsman recommendations to bring proceedings against the agency 	No specific response	No work progressed

Recommendation	Previous Government's response	Work progressed to date
Proactive release		
<ul style="list-style-type: none"> Place a duty on agencies subject to the OIA/LGOIMA to take all reasonably practicable steps to proactively make official information available (although accounting for things like their resources). 	No specific response	<p>In 2017, the Cabinet Manual was amended to include an expectation that "Cabinet material (Cabinet and Cabinet committee papers and minutes) on significant policy decisions will be released proactively once decisions have been taken". SSC published proactive release principles and guidance to help agencies develop their own policies and procedures. Advice on a possible non-statutory process for strengthening proactive release expectations is currently being developed.</p>
Oversight and guidance		
<ul style="list-style-type: none"> The function of providing oversight for official information legislation should be established by statute and carried out by a statutory office holder. 	Disagreed – considered that the oversight provided by the Office of the Ombudsman is sufficient	<p>SSC, and the Office of the Ombudsman, have continued to strengthen their oversight roles. SSC established a work programme to improve public sector OIA practice in 2016.</p> <p>In 2016 the Secretary for Justice delegated to the State Services Commissioner the Ministry of Justice's responsibility for providing advice or assistance to departments and organisations about the OIA.</p>
<ul style="list-style-type: none"> Establish a new charging framework that is cohesive, consistent and principled. 	No specific response	<p>A review of the charging framework was begun by the Ministry of Justice. A review of the charging framework is now planned for 2018.</p>
<ul style="list-style-type: none"> Enhance guidance, particularly by: <ul style="list-style-type: none"> - publishing Ombudsman cases routinely - replacing the Ombudsman's 'Practice Guidelines' with new guidelines that use case examples, and clarify principles and presumptions - producing of a full commentary analysing Ombudsman decisions. 	Agreed – expressed support for the Ombudsman's work to progress recommendations regarding guidance.	<p>The Office of the Ombudsman has been reviewing and updating its official information legislation guides, which include case studies and succinct and accessible explanations of key principles and concepts. It also regularly publishes notes on OIA and Ombudsman Act cases on its website. Justice is not aware whether work has been progressed on a full commentary on Ombudsman decisions.</p> <p>The SSC has also published a suite of guidance for agencies as part of its work programme to improve agency OIA practices.</p>
Scope of the Acts		
<ul style="list-style-type: none"> Extend OIA coverage to include courts administration. 	Agreed	<p>The District Court Act 2016 and the Senior Courts Act 2016 established a scheme for determining what information was to be classified and 'court information', and what was to be 'Ministry of Justice' information. Information about the administration of the courts, such as expenditure, resources and statistics is now deemed Ministry of Justice information, and therefore subject to the OIA.</p>
<ul style="list-style-type: none"> Extending OIA coverage to include Officers of Parliament (the Ombudsman, Auditor General and the Parliamentary Commissioner for the Environment), Parliamentary Counsel Office, Office of the Clerk, Parliamentary Service and Speaker of the House. 	Disagreed – considered that current Parliamentary processes for developing rules around access and use of information are satisfactory, and better achieve the desired balance between access to information and the proper functioning of Parliament.	No work progressed
<ul style="list-style-type: none"> Arrange a working party to resolve inconsistencies between schedules in the OIA and LGOIMA, and to ensure all agencies which need to be covered by the scope of the Acts are listed. 	No specific response	No work progressed
Compatibility with other legislation		
<ul style="list-style-type: none"> Resolve inexplicable differences between the OIA and LGOIMA, and clarify their relationship with each other and with other legislation. 	No specific response regarding alignment	No work progressed
<ul style="list-style-type: none"> Consider combining the OIA and LGOIMA. 	Disagreed that the two Acts be combined.	
<ul style="list-style-type: none"> Produce guidance for agencies on the interaction between official information legislation and the Government release and reuse policy. 	No specific response	No work progressed

From Weekly Report to Minister Little 04.05.2018

Liability for official information released proactively

6. We understand that you, Hon Clare Curran and Hon Chris Hipkins have discussed amending the Official Information Act 1982 (OIA) to extend the section 48 protection from legal liability to information released proactively. Section 48 protects against actions such as defamation claims, breach of privacy and breach of confidence, where information has been released in good faith under the OIA. This protection does not currently apply to material that is proactively released.
7. In its 2012 report The Public's Right to Know, the Law Commission recommended that the protection should not be extended to proactively released information, because:
 - proactive release involves an active and voluntary decision to publish, which should include considering the legal consequences
 - damage from information proactively released is potentially greater as it is released to more people
 - if information released under the OIA is published by a requestor (e.g. online or in the media), any person who is harmed can take action against the requestor but not the agency. A person harmed by information released proactively may be left with no recourse.

8. s 9(2)(g)(i)

9. s 9(2)(f)(iv)

Contact: Chris Hubscher, Policy Manager, Electoral and Constitutional, Policy. Ph s 9(2)(a)
Rajesh Chhana, Deputy Secretary, Policy. Ph s 9(2)(a)

From Weekly Report to Minister Little 07.09.2018

Liability for official information released proactively

12. Cabinet discussed the paper Strengthening Proactive Release Requirements on 3 September 2018. The paper notes that the proactive release policy could be supported by an amendment to the Official Information Act 1982 (OIA) that would extend the section 48 protection from legal liability when information is released under the OIA to information released proactively.

13. s 9(2)(f)(iv)

14.

Contact: Chris Hubscher, Policy Manager, Electoral and Constitutional Policy. Ph s 9(2)(a)
Rajesh Chhana, Deputy Secretary, Policy. Ph s 9(2)(a)

Lescelius, Jason

From: Megan Bray <Megan.Bray@parliament.govt.nz>
Sent: Thursday, 17 May 2018 5:21 p.m.
To: David Hawkins
Subject: Papers for meeting with Mins Curran and Hipkins, 22 May 8pm
Attachments: Report to Ministers_ Next steps in considering reform of the Official Information Act 1982.DOCX; Table of Law Commission recommendations and work to date FINAL (MoJ) - Attachment A.DOCX; SSC A3- System wide progress implementing the OIA.PPTX; MoJ A3 on OIA leg reform April 2018.PPTX; SSC A3_Proactive release summary A3 May 2018.PPTX

Hi David,
E-copies of papers for Minister Little's meeting with Minister Curran and Minister Hipkins on 22 May regarding the Official Information Act.
Regards,
Megan

Megan Bray | Private Secretary (Open Government)

Office of Hon Clare Curran | Associate Minister of State Services (Open Government)
Room 4.5L Executive Wing | Private Bag 18 888 | Parliament Buildings | Wellington 6160
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s 9(2)(a)



SSC REPORT

STATE SERVICES COMMISSION
Te Pūnaha Matua Kaitiaki



Possible legislative reform to the Official Information Act 1982

Date: 17 May 2018

Report No: SSC2018/519

Contact: Catherine Williams, Deputy Commissioner, Integrity, Ethics and Standards

Telephone: s 9(2)(a)

IN-CONFIDENCE

	Action Sought	Deadline
Hon Clare Curran Associate Minister of State Services (Open Government)	Send the report to Minister Hipkins and Minister Little.	17 May 2018
Hon Chris Hipkins Minister of State Services	Discuss the proposals in this report.	Meeting on 22 May 2018, 8.00 - 8.30 pm
Hon Andrew Little Minister of Justice	Discuss the proposals in this report.	Meeting on 22 May 2018, 8.00 - 8.30 pm

Enclosure: Yes (attached)

Executive Summary

- 1 This report proposes targeted consultation on the Official Information Act 1982 (OIA). This will assist Ministers to decide whether or not they consider there is a case to initiate a formal review of the OIA.
- 2 The attachments provide information on:
 - 2.1 the Law Commission's 2012 recommendations for reform of official information law and subsequent work
 - 2.2 progress on work to improve agencies' compliance with the letter and spirit of the OIA
 - 2.3 four possible approaches to OIA reform, and
 - 2.4 information Minister Curran used for Ministerial consultation on a proactive release policy.

Recommended Action

- 3 We recommend that you:
- a **agree** to targeted consultation on the Official Information Act 1982 to inform consideration on whether or not there is a case to initiate a formal review of the Act.

Agree/disagree

Hon Clare Curran

Associate Minister of State Services (Open Government)

Hon Minister Hipkins

Minister of State Services

Hon Andrew Little

Minister of Justice

SSC Report: Possible legislative reform to the Official Information Act 1982

Purpose of Report

- 4 This report proposes targeted consultation on the Official Information Act 1982 (OIA). This will assist Ministers to decide whether or not they consider there is a case to initiate a formal review of the OIA.

Background

- 5 There have long been calls in New Zealand for a review of, or amendment to, the OIA. This means we have a lot of information available on the how the OIA works. For example:
- 5.1 In 2012 the Law Commission undertook a review of official information legislation. The report recommendations included significant legislative change but the then Government favoured largely operational improvements (refer to Attachment A for Law Commission's recommendations and work to date).
- 5.2 The annual public engagement on the initiatives New Zealand might progress in its Open Government Partnership (OGP) Action Plan has included concerns on the statutory framework and the operation of the OIA. The OIA is coming through again during discussion of the 2018/20 Action Plan.
- 5.3 There are growing calls by media, academics and other commentators for the OIA to be reviewed.
- 5.4 In response to Dame Beverly's Wakem's 2015 investigation into government agencies' OIA practices, the State Services Commission,¹ the Office of the Ombudsman, and government agencies have been working on operational improvements (refer to Attachment B for the current state of the programme).
- 5.5 On 27 November 2017, Dr Bryce Edwards authored a column for the Newsroom website. The article started the Campaign for Open Government calling for "a coalition of activists, journalists, academics and the public, to join together to encourage the new government to fix the OIA system."
- 6 Ministers have also discussed whether the OIA should be amended to provide Ministers with protections from civil and criminal liability when they make proactive release decisions (something the 2012 Law Commission report was against).
- 7 The Ministry of Justice, with the support of the State Services Commission, has drafted four possible approaches for legislative reform (refer to Attachment C).

Proposal

- 8 To round out the information already available we propose that targeted consultation take place to understand current positions on the OIA.

¹ The State Services Commissioner has been delegated the functions under section 46 of the OIA by the Secretary for Justice. This function includes providing advice and guidance to agencies to act in accordance with the OIA.

People with specific expertise in the law

- 9 We propose that the following people who have specific expertise be approached for their views:

ss 9(2)(a) and 9(2)(g)(i)

Other individuals and groups

- 10 The views from those with expertise in the law, could be supplemented by other New Zealanders as discussed below.

New Zealanders engaged with the developing our next Open Government Partnership Action Plan

- 11 New Zealanders are providing their thoughts online (<http://www.ogp.org.nz/our-conversation/topics-of-conversation/>) and through social media to suggest initiatives that would make New Zealand more open. Others are registering to attend workshops on the development of New Zealand's 2018/2020 OGP Action Plan. Ideas that have been submitted to date include reform of official information laws.

The Open Government Partnership Expert Advisory Group

- 12 This group provides advice to the State Services Commission from the perspective of civil society on open government matters. The members are:

Who	Background
Mr Anaru Fraser	Mr Fraser is the General Manager of Hui E! Community Aotearoa an agency that seeks to promote, strengthen and connect the Community Sector. Mr Fraser has over 15 years' international policy development experience in the United Nations in areas including food security and malnutrition and environmental and cultural rights related to Indigenous Peoples and civil societies.
Mr Te Raumawhitu (Te Rau) Kupenga	Mr Kupenga is of Ngati Porou descent. Originally a litigation lawyer, Mr Kupenga is currently the principal in his consulting firm Te Amokura. He has been a senior leader at the Ministry for the Environment and the Ministry of Education. He holds a number of governance roles.
Professor Miriam Lips	Professor Lips is Chair in the Digital Government School of Government Victoria University of Wellington. Since 2015 Professor Lips has been leading and undertaking a five-year research programme on 'Government and Democracy in the Digital Age' in partnership with the Department of Internal Affairs, Inland Revenue Department, the Ministry of Education and Datacom.
Mr Scott Miller	Mr Miller is the chief executive of Volunteering New Zealand and has experience working in private, public and other NGO roles. He speaks internationally on volunteering, democracy, and open government.
Mr Phil Newman	Mr Newman is the International Programmes Director at Tearfund (a New Zealand based aid and development organisation, serving communities across Africa, Asia and South America). He moved from working in finance to international aid & development, governance here and in Australia.
Ms Rachel Roberts	Formally a journalist and radio producer for National Radio, Ms Roberts works with agencies across sectors on strategic leadership, strategy development, implementing projects, advocacy and communications.

Ms Suzanne Snively	Chair Transparency International New Zealand. Ms Snively specialised as an economic strategist at PWC. She has 30 years' experience as a company director on public and private Boards.
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Journalists

- 13 There is no professional journalist grouping that represents the media. Given this some or all the following, who are covered by the Press Council complaints process, could be approached for a discussion on the OIA.
- 13.1 Otago Daily Times, an independent newspaper that is locally owned.
 - 13.2 Stuff.
 - 13.3 NZ Herald.
 - 13.4 TVNZ.
 - 13.5 Media works (whose ownership includes Newshub, TV3, and Newstalk ZB).
 - 13.6 Māori Television.
 - 13.7 RNZ.
 - 13.8 Richard Harmon, who has 35 years of political journalism experience and now publishes online through his website Politik.

Other bloggers and other commentators

- 14 Other bloggers and commentators (to the extent that this group has not been covered through the OGP conversations) could include:

ss 9(2)(a) and 9(2)(g)(i)

- 15 Subject to the information gathered, some wider workshops and / or online tools could be used to test the issues raised.

Resourcing

- 16 The targeted consultation would need to be led by the Ministry of Justice, who administer and lead policy advice on the OIA, with the support of the State Services Commission.
- 17 If a subsequent decision is made to review the OIA, the expectation is that the Ministry of Justice will lead the review, with support from the State Services Commission.

Timeframe

- 18 If you agree to the targeted consultation the Ministry of Justice and the State Services Commission will come back to you with a proposed timeframe and resourcing requirements.

19 9(2)(g)(i)

Consultation

20 The Ministry of Justice was consulted on this report.

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

Law Commission's 2012 Report *The Public's Right to Know: Review of the Official Information Legislation: Overview of Key Recommendations and Related Work to Date* (Attachment A)

Recommendation	Previous Government's response	Work progressed to date
The legislative vehicle		
<ul style="list-style-type: none"> Re-draft and re-enact the OIA and LGOMA to achieve better order and structure, and to modernise and simplify the language 	Disagreed, but committed to keep the operation of the official information legislation under review and progress other recommendations as competing priorities allowed.	Not applicable
The withholding grounds		
<ul style="list-style-type: none"> Make the 'good government' withholding grounds easier to understand (constitutional conventions and free and frank advice). Introduce three new withholding grounds for protecting: <ul style="list-style-type: none"> Sensitive commercial information relating to financial position Information provided for the purpose of an investigation or inquiry sensitive cultural information (there is currently limited provision for this in the LGOMA but not the OIA). Where third party information comes under the scope of a request, require that the third party be given advance notice. 	<p>Agreed in principle to withholding grounds for sensitive commercial information relating to financial position.</p> <p>No specific response in relation to the other recommendations.</p> <p>The Government committed to assessing whether the recommendations for clarification were appropriate for inclusion in legislative vehicles such as the Statutes Amendment Bill when they became available.</p>	While the Office of the Ombudsman, and SSC, has published guides on the existing withholding grounds over the past three years, they do not address the need identified by the Report to express existing concepts in plainer language, or to introduce new protections for certain types of information.
Requests and resources		
<ul style="list-style-type: none"> Better define the term "due particularity". Extend the "substantial collation and research" refusal grounds to recognise that other elements of processing a request (e.g. consultation) can present unreasonable burden on agencies. Clarify the definition of "vexatious requests". 	No specific response	No work progressed
Processing requests		
<ul style="list-style-type: none"> Clarify: <ul style="list-style-type: none"> that one extension can be taken above the standard 20-day timeframe. that partial transfers of requests are permitted. the process for handling "urgent" requests. 	No specific response	The Official Information Amendment Act 2015 clarified that partial transfers are permitted.
Complaints and remedies		
<ul style="list-style-type: none"> Align the two distinct review processes that the OIA provides for (the Ombudsman conducts reviews according to the OIA or the Ombudsman Act, depending on the type of information) Introduce an additional grounds for complaint to the Ombudsman for unsatisfactory agency process (e.g. late responses) Allow an individual whose case has resulted in Ombudsman recommendations to bring proceedings against the agency 	No specific response	No work progressed

Proactive release			No specific response	In 2017, the Cabinet Manual was amended to include an expectation that "Cabinet material (Cabinet and Cabinet committee papers and minutes) on significant policy decisions will be released proactively once decisions have been taken". SSC published proactive release principles and guidance to help agencies develop their own policies and procedures. Advice on a possible non-statutory process for strengthening proactive release expectations is currently being developed.
Oversight and guidance			Disagreed - considered that the oversight provided by the Office of the Ombudsman is sufficient	SSC, and the Office of the Ombudsman, have continued to strengthen their oversight roles. SSC established a work programme to improve public sector OIA practice in 2016. In 2016 the Secretary for Justice delegated to the State Services Commissioner the Ministry of Justice's responsibility for providing advice or assistance to departments and organisations about the OIA. A review of the charging framework was begun by the Ministry of Justice. A review of the charging framework is now planned for 2018. The Office of the Ombudsman has been reviewing and updating its official information legislation guides, which include case studies and succinct and accessible explanations of key principles and concepts. It also regularly publishes notes on OIA and Ombudsman Act cases on its website. Justice is not aware whether work has been progressed on a full commentary on Ombudsman decisions. The SSC has also published a suite of guidance for agencies as part of its work programme to improve agency OIA practices.
• Place a duty on agencies subject to the OIA/LGOIMA to take all reasonably practicable steps to proactively make official information available (although accounting for things like their resources).			No specific response	
The function of providing oversight for official information legislation should be established by statute and carried out by a statutory office holder.			Disagreed - considered that the oversight provided by the Office of the Ombudsman is sufficient	
• Establish a new charging framework that is cohesive, consistent and principled.			No specific response	
• Enhance guidance, particularly by: - publishing Ombudsman cases routinely - replacing the Ombudsman's 'Practice Guidelines' with new guidelines that use case examples, and clarify principles and presumptions - producing of a full commentary analysing Ombudsman decisions.			Agreed - expressed support for the Ombudsman's work to progress recommendations regarding guidance.	
Scope of the Acts			Agreed	The District Courts Act 2016 and the Senior Courts Act 2016 established a scheme for determining what information was to be classified and 'court information', and what was to be 'Ministry of Justice' information. Information about the administration of the courts, such as expenditure, resources and statistics is now deemed Ministry of Justice information, and therefore subject to the OIA. No work progressed No work progressed
• Extend OIA coverage to include courts administration.			Agreed	
• Extending OIA coverage to include Officers of Parliament (the Ombudsman, Auditor General and the Parliamentary Commissioner for the Environment), Parliamentary Counsel Office, Office of the Clerk, Parliamentary Service and Speaker of the House.			Disagreed - considered that current Parliamentary processes for developing rules around access and use of information are satisfactory, and better achieve the desired balance between access to information and the proper functioning of Parliament.	
• Arrange a working party to resolve inconsistencies between schedules in the OIA and LGOIMA, and to ensure all agencies which need to be covered by the scope of the Acts are listed.			No specific response	
Compatibility with other legislation			No specific response regarding alignment	
• Resolve inexplicable differences between the OIA and LGOIMA, and clarify their relationship with each other and with other legislation.			Disagreed that the two Acts be combined.	No work progressed
• Consider combining the OIA and LGOIMA.			No specific response	No work progressed
• Produce guidance for agencies on the interaction between official information legislation and the Government release and reuse policy.			No specific response	No work progressed

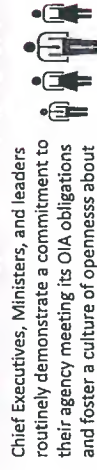
In 2016, following the release of the Chief Ombudsman's report *Not a Game of Hide and Seek*, a major work programme was established to improve agencies' compliance with the letter and spirit of the Official Information Act (OIA). The programme is driven by the State Services Commissioner and owned by State service Chief Executives – recognising that it takes an all-of-system commitment to lift performance in this area.

System performance has lifted significantly since 2016. While there's room for improvement in some areas, we're seeing an increase in engagement from agencies across the State service, and a real effort to do better across the board. The result has been an improvement right from the worst performers, all the way through to the best performing agencies.

We are continuing to support agencies to lift their performance, while also looking ahead at how we can drive up proactive release of official information.

Progress made against priority areas identified in *Not a Game of Hide and Seek*

LEADERSHIP AND CULTURE



Chief Executives, Ministers, and leaders routinely demonstrate a commitment to their agency meeting its OIA obligations and foster a culture of openness about the work of the agency

'...I became the Chief Ombudsman, about the same time as Peter Hughes became the State Services Commissioner, and were determined that we would set the tone, we would reduce delays and we would speak publicly and release statistics to be able to demonstrate those departments and Ministers that weren't performing...it's made a demonstrable difference' (Chief Ombudsman Peter Boshier)

Strong, coordinated leadership from the State Services Commissioner and the Chief Ombudsman, supported by Chief Executives, has been critical in driving up system performance. Commitments to improve OIA practices have been reflected in the OGP 2016-18 National Action Plan – giving this important area added visibility and priority.

ORGANISATION, STRUCTURE, STAFFING, AND CAPABILITY



Appropriate, flexible structures have been established within the agency to deal with OIA requests

'We used SSC's Capability Toolkit to undertake a current state self-assessment and to help to design a future work programme' (the Department of Conservation)

We've developed and published a self-assessment toolkit for agencies to help them understand their current capability and identify areas for improvement. This fit-for-purpose approach ensures that we respond to the needs of individual agencies. We're working with agencies that have established good practices to develop case studies that showcase for others the way they go about managing OIA requests.

CURRENT PRACTICES



The practice in an agency aligns with its policies and procedures

'We reached a really good point in the afternoon ... a lot of agreement on the practicalities of how we handle positive responses online.' (National DHBs Workshop)

SSC has established an OIA Forum, which provides a network for OIA leaders and practitioners to share good practice. The well-subscribed Forum was convened four times in 2017. In response to agency demand, we have also run a number of workshops on topics such as proactive release and how to use the Capability Toolkit – in addition to more general training on the OIA. Uptake has been high, which reflects an increase in the level of engagement on OIA across the State service.

INTERNAL POLICIES, PROCEDURES, AND RESOURCES



The agency creates or adopted appropriate OIA-related policies and procedures, which are accurate and promote good decision-making

The most common forms of OIA training are on-the-job (approximately 75%) and coaching or mentoring (approximately 50%)

We surveyed 85 agencies in 2017 and found that there's a strong demand for guidance from SSC on the OIA. We've published a series of tools and guidance for agencies on the SSC website, with practical advice on effective implementation of the OIA and proactive release. We're planning to publish further guidance based on the needs identified by agencies – including on release of officials' names, and the charging guidelines.

PERFORMANCE MONITORING AND LEARNING



There are meaningful and appropriate performance measures for responding to OIAs linked to the agency's strategic or operational plans, and key performance measures are actively monitored

Over 40,000 requests are received by agencies each year – and 95.3% of them are now responded to on time

In 2016 the Chief Ombudsman and the State Services Commissioner agreed to work together on performance monitoring and reporting. Since January 2017, SSC has published a half-year set of OIA statistics for the 110 agencies which make up the State services. Chief Executives are using these statistics to drive performance in their agencies. Guidance has also been provided to agencies on what OIA requests should be logged, monitored, and reported on – and a range of suggested OIA performance measures for internal and public reporting.

Key statistics

There has been an increase in the volume of OIA requests for each of the three periods measured.

Despite an increased workload, agencies have improved the time taken to respond. For the most recent half-year period from July to December 2017, agencies received a total of 21,323 requests.

REQUESTS ON TIME



AVERAGE AGENCY TIMELINESS



Period



2015/16

2016/17

Jul-Dec 17



Possible approaches legislative reform to the Official Information Act 1982 (Attachment C)



In 2012, The Law Commission published *The Public's Right to Know* on the functioning of the official information legislation.

The report's recommendations included significant legislative change, but the then-Government favoured largely operational improvements. The focus since then has been on improving OIA practice, and most recently, increasing the level of proactive release.

Law change that seeks to improve the openness, transparency and accessibility of government information remains an option. Four possible approaches to legislative reform are set out below.

PUBLIC FEEDBACK on the OGP NATIONAL ACTION PLAN 2016-2018

- Extend OIA to Parliamentary bodies
- Establish Official Information Authority
- Mandatory publication requirements and centralised portal
- Anyone able to make a request for information.
- Provide for proactive release in law.

ACADEMICS AND OTHER COMMENTATORS VIEWS

- First-principles review of the OIA
- Extend to Solicitor-General and some Parliamentary bodies
- Establish Information Authority.
- Stronger complaints regime
- Provide for proactive release

Full public review of official information legislation

- Could target areas that would benefit from further public engagement (e.g. proposal to establish an Information Commissioner)
- Would take account of developments since 2012

s 9(2)(f)(iv)

Reconsider full set of recommendations from the Law Commission's 2012 Report

- Builds on public consultation process undertaken by the Law Commission in 2009-2012, where issues and recommendations remain relevant

s 9(2)(f)(iv)

- Use targeted consultation (e.g. with OIA experts) and departmental consultation to check the Law Commission recommendations remain relevant

Targeted reforms to address discrete Law Commission recommendations

- Use targeted consultation (e.g. with OIA experts) and departmental consultation to check approach remains up to date

Legislative amendments to support proactive release

- Legislate specific amendments to strengthen the existing push towards proactive release

s 9(2)(f)(iv)

s 9(2)(f)(iv)

PROACTIVE RELEASE OF CABINET MATERIAL AND KEY ADVICE (ATTACHMENT D)

The proposal to proactively release Cabinet material and key advice supports the Government's ambition to grow an open, trusted, modern democracy that allows all New Zealanders to thrive. This page sets out key information about the proactive release policy, including several options in yellow for how it can be carried out.

THE PROPOSAL

Why do we need this policy?

Trust in government is vital for democracies. There is demand from the public, commentators, and academics for greater openness and transparency.

This is an opportunity to:

- increase public understanding of democratic processes and how to participate in Government decision-making
- build our reputation of international leadership by setting another example of openness and transparency
- strengthen the public accountability of decision makers and advisors

Definitions

There are two kinds of information covered by this policy.

1. **Cabinet Material:** The Cabinet Manual already includes a general expectation that Cabinet material on significant policy decisions should be released proactively once decisions have been made.
 - o So what's the proposed change? Most Cabinet decisions could be described as significant, but not all will be policy decisions. This is an opportunity to build on the Cabinet Manual by including all Cabinet material (Cabinet and Cabinet Committee papers and minutes) where decisions are taken – not just policy decisions.
2. **Key advice papers:** Key advice papers are only those that are addressed to the Minister taking the item to Cabinet, from their department and seek agreement from the Minister to recommendations that have subsequently been decided by Cabinet. Key advice does not include papers that only contain noting recommendations, second opinion advice, or background information. It does not include all OIAs received, or advice provided to the Minister from sources other than the lead department.
 - o So what's the proposed change? This is a new proposal – there is no current expectation that key advice papers should be proactively released.

Guidance

There will be some material (in part or in full) that may not be appropriate for proactive release under this policy due to sensitivities around timing, content, or other matters. Material that wouldn't be released under the OIA will not be released under this policy.

We will develop Guidance to assist decision-makers with this. A non-exhaustive list of examples of what would not be released is provided below:

- ✗ legally privileged papers
- ✗ APH appointment papers
- ✗ papers that are commercially sensitive
- ✗ papers that are subject to ongoing Treaty settlement negotiations
- ✗ papers that contain information about privileged national security matters

WHAT IT MEANS IN PRACTICE

What volume of information will be released in practice?

In 2016/17 there were about 1,200 non-APH Cabinet papers and 1,700 Cabinet minutes (comparison: 26,000 OIA requests received by departments for the same period). We are undertaking work to understand the volume of 'key advice' papers in scope, but it will likely be more than the volume of Cabinet papers and Cabinet minutes.

What are the cost implications?

We are undertaking further work to better understand the cost implications. This depends on a number of factors, including the number and complexity of papers generated by the Minister, the maturity of proactive release policies and implementation within departments and Ministers' offices, and the level of consultation required to assess papers for proactive release.

How will the release of material be approved?

Ministers will approve the release of the entire package of material (both Cabinet papers and key advice papers). This is simple and clear because there is only one decision required, and will allow Ministers to consider the whole package when making a decision. Only Ministers can release Cabinet material, and this approval process reflects the fact that key advice papers are closely related to Cabinet decisions and Ministerial functions.

Could Ministers be legally liable?

Current OIA protections do not apply to the proactive release of official information. That means decision-makers, including Ministers, may be liable for legal issues arising from the proactive release under this policy. The proposed review of the OIA may consider whether changes should be made to ensure that appropriate protections apply to proactive release. In the interim, there are ways to mitigate against this risk – for example, by carrying out a risk assessment based on the criteria in the Guidance before making official information available. Similar judgement is already exercised when releasing Cabinet and departmental material. Although the proactive release policy will mean that a greater volume of material is being considered but it will use principles and processes that are already well understood.